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February 26, 2007

Hon. Paul F. Condino  
Chair, Judiciary Committee  
Michigan House of Representatives  
State Capitol Building  
P.O. Box 30014  
Lansing, MI 48909

Re: House Judiciary Committee Hearings on the Judicial Article of the Michigan Constitution and the Michigan Supreme Court

Dear Chairman Condino:

You have requested my opinion, as a Professor of Constitutional Law, on the matter of the House Judiciary Committee holding public hearings on the Judicial Article of the Michigan Constitution and the Michigan Supreme Court. You have advised me that such hearings seemed appropriate at the present time because of the controversy, played out in the media, among members of the Michigan Supreme Court, concerning issues that have arisen before the Court. You expressed your concern that public hearings before your Committee would not in any way be inconsistent with the separation of powers provisions of Mich Const 1963, Art. III, sec. 2. I am pleased to respond to your request.

First, your concern that the public hearings before your Committee would not in any way be inconsistent with the constitutional principle of separation of powers is well-taken. The constitutional principle of separation of powers forbids the Michigan Legislature not only from enacting laws that govern the operations of the Michigan courts, but from applying laws of general application, such as the Open Meetings Act, to the courts. See *e.g. In re "Sunshine Law,"* 400 Mich 660, 255 NW2d 635 (1977) (Open Meetings Act could not constitutionally be applied to a court while exercising rulemaking authority and while deliberating or deciding upon issuance of administrative orders. This being so, it would be improper for your Committee to hold hearings for the purpose of proposing legislation that would regulate or affect the operations of the Michigan Courts.

Article VI of the Michigan Constitution, the Judicial Article, is a comprehensive regulation of the exercise of Judicial Power in Michigan. That Article, like other provisions of the Michigan Constitution, may be amended by legislative proposal and public vote. The proposed amendment must be agreed to by two-thirds of the Members of each House and by a majority of the voters at the next general or special election as the Legislature shall direct. Mich Const 1963, Art. XII, sec. 1. The Constitution may also be amended by petition and public vote. The petition must contain signatures of registered voters equal to 10% of the total votes cast for all candidates for Governor at the last Gubernatorial election, and if it satisfies that requirement, the petition is submitted to the voters at the next general election.

A proposed amendment to the Michigan Constitution originating in the Michigan House would properly be referred to the House Judiciary Committee. Especially is this so if the proposed amendment concerns the Judicial Article. Thus, it is appropriate for the House Judiciary Committee to hold public hearings on possible amendments to the Judicial Article including amendments relating to the controversy among members of the Michigan Supreme Court, concerning issues that have arisen before the Court. Those hearings would provide relevant information to the Members of the Legislature that might lead to one or more proposed amendments to the Judicial Article. They would also provide relevant information to members of the general public, who might wish to organize a petition to amend the Judicial Article.

The current controversy among members of the Michigan Supreme Court concerning matters that have arisen before the Court suggests that it may appropriate for the Judiciary Committee to take a look at the Judicial Article and to consider whether some provisions need to be amended and/or other provisions added. Let me suggest the following areas of inquiry.

#### 1. The Decisionmaking Process of the Michigan Supreme Court

Mich Const 1963, Art. 6, sec. 3 requires that all decisions of the Michigan Supreme Court be in writing and contain a concise statement of the facts and reasons for each decision and reasons for each denial of leave to appeal. Furthermore, whenever a judge of that Court dissents, the judge "shall give in writing the reasons for his dissent." In the case of Grievance Administrator v. Fieger, 476 Mich 231, 719 NW2d 123 (2006), it appears that a question arose concerning publication of the dissent of Justice Elizabeth Weaver. It is possible that a majority of the Court originally blocked publication of the dissent on the ground that it contained information about the internal deliberations of the Court, but later agreed to its publication, and it was published. In any event, on December 6, 2006, the Michigan Supreme Court, by a vote of 4-3, issued Administrative Order No. 2006-8, headed, "Deliberative Privilege and Case Discussions on the Supreme Court." Under that Order, "All correspondence,

memoranda and discussions regarding cases or controversies are confidential," and the obligation to honor confidentiality does not expire when a case is decided. The only exception is that a Justice may disclose any unethical, improper or criminal conduct to the Judicial Tenure Commission or proper authority.

It is certainly arguable that the concept of "judicial deliberative privilege" is inconsistent with the openness of the decisionmaking process of the Michigan Supreme Court provided for in Art. 6, sec. 3. A majority of the Michigan Supreme Court, however, thinks otherwise. The matter of "judicial deliberative privilege" and the openness of the decisionmaking process of the Michigan Supreme Court are proper subjects for a hearing before the House Judiciary Committee. The hearing may lead to proposed amendments to Art. 6, sec. 3 that might expressly incorporate "judicial deliberative privilege" into Art. 6, sec. 3, or expressly prohibit it and ensure that the decisionmaking process of the Michigan Supreme Court be completely open and that no correspondence, memoranda and discussions about the cases before the Court are hidden from the public.

## 2. Disqualification of Judges

The Judicial Article contains no provisions dealing with the disqualification of judges, and in practice, each judge decides for himself or herself whether he or she has a conflict of interest that prevents the judge from sitting on that case. In Grievance Administrator v. Fieger, *supra*, Fieger, an attorney who was facing disciplinary action by the Court and who had asserted a constitutional claim, argued that four Justices should be disqualified from hearing the case because they had attacked Mr. Fieger when running for election to the Court. The Justices concluded that they were not required to recuse themselves and that they could "accord fair and impartial treatment to Mr. Fieger in this case." Justice Weaver dissented on the ground that "statements made during their respective judicial campaigns displaying bias and prejudice against Mr. Fieger require Chief Justice Taylor and Justices Corrigan, Young and Markman to recuse themselves from this case in which Mr. Fieger is himself a party." At the present time, Michigan Court Rule 2.003 provides for judicial disqualification and sets forth a procedure for the filing a disqualification motion. The Justices, of the Michigan Supreme Court, of course, decide their own disqualification, and there is no process for review of that decision. And while the Justices sometimes give reasons for their disqualification decisions, they sometimes do not, and there may be a question whether under Art. 6, sec. 6, they are required to give reasons for their disqualification decisions.

It is appropriate for the Judiciary Committee to hold hearings to consider whether provisions dealing with the disqualification of judges, including Justices of the Michigan Supreme Court, should be placed in the Judicial Article.

### 3. The Role of the Judicial Tenure Commission

Mich Const 1963, Art. VI, sec. 30, provides for the disciplining of judges through the operation of a Judicial Tenure Commission. The Commission investigates complaints of judicial misconduct and makes recommendations of discipline for judges to the Michigan Supreme Court. Only the Michigan Supreme Court can impose discipline.

While in theory a complaint of judicial misconduct against a Justice of the Michigan Supreme Court could be filed with the Judicial Tenure Commission, this is highly unlikely, since it is the Michigan Supreme Court that ultimately passes on the merits of the claim and imposes discipline. It is appropriate for the Judiciary Committee to hold hearings to consider whether Art. VI, sec. 30 should be amended to provide a process by which claims of judicial misconduct could be filed against a Justice of the Michigan Supreme Court. In this connection, the Committee would doubtless take into account the fact that under Mich Const 1963, Art. VI, sec. 25, the legislature may, by concurrent resolution of two-thirds of the entire membership of each house, effect the removal of any judge "for reasonable cause." See In re Seitz, 441 Mich 590, 495 NW2d 559 (1993). This would include Justices of the Michigan Supreme Court, and for this reason, it may not be necessary to amend Art. VI, sec. 30, in order to provide a remedy for judicial misconduct by Justices of the Michigan Supreme Court. These questions could be explored in a hearing before the Committee.

### 4. The Election of Justices to the Michigan Supreme Court

The Committee might wish to consider the constitutional process for the election of Justices to the Michigan Supreme Court. The process is "politicized" in the sense that candidates are nominated and elected through a political process and then run in a non-partisan election. See Mich Const 1963, Art. VI, sec. 2; MCL 168.392 *et seq.*, and the discussion of the process in Adair v. Michigan Department of Education, 474 Mich 1027, 709 NW2d 567 (2006), discussing the necessity of candidates for the Court seeking campaign contributions. In addition, all incumbent Justices, including those appointed by the Governor to fill a vacancy on the Court, have the incumbent designation on the ballot. Mich Const 1963, Art. VI, sec. 24.

Over the years numerous proposals have been presented to change the constitutional process for the election of Justices to the Michigan Supreme Court, and it is appropriate for the Committee to consider the matter of election to the Court at this time.

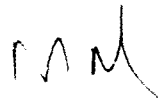
In regard to the hearings themselves, it may be noted that separation of powers considerations would preclude the Committee from subpoenaing Justices of the

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Michigan Supreme Court, other judges, or employees of any of the Michigan courts. However, separation of powers considerations would not preclude the Committee from hearing testimony from Justices of the Michigan Supreme Court, other judges, or employees of any of the Michigan courts who voluntarily chose to testify before Committee.

I hope that these observations will have been of assistance to the Committee. Please feel free to call on me for any further assistance that I may be able to render.

Sincerely,

A handwritten signature in black ink, appearing to be 'RAS' with a stylized flourish at the end.

Robert A. Sedler

RAS/oh

